Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,

v.

SHIRLEY K. ROGERS,
Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Rule 41(d) of the Federal Rules of Civil Procedure authorize awards of attorney fees?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of the case. Wal-Mart Stores, Inc. does not have a parent company; nor does any publicly held company own 10% or more of Wal-Mart's stock. Wal-Mart currently owns more than 60% of Wal-Mart de Mexico, S.A. de C.V., a separately traded stock on BOLSA, the Mexican stock exchange. *See* Sup. Ct. R. 29.6.

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OPINIONS BELOW

The opinion of the court of appeals (App. 2a-13a) is reported at 230 F.3d 868, and the district court's opinions (App. 15a-20a) are unreported.

JURISDICTION

The court of appeals entered its judgment on October 26, 2000. App. 1a. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides in part:

> [A]n action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.

Rule 41(d) of the Federal Rules of Civil Procedure provides:

> If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

STATEMENT

On October 17, 1997, Shirley Rogers filed a complaint in Tennessee state court against Wal-Mart, seeking $950,000 in damages. The theory of the action was negligence, and the claim was that plaintiff tripped over a wooden pallet that a Wal-Mart employee had left in the aisle of one of the company's stores. Wal-Mart removed the case to the United States District Court for the Western District of Tennessee on diversity grounds.

On October 9, 1998, one year later and after plaintiff had missed the court's deadline for disclosing her expert witnesses, she received permission from the district court under Fed. R. Civ. P. 41(a) to dismiss the case without prejudice.

On February 4, 1999, another sixteen months later, plaintiff filed a new complaint in Tennessee state court. Stemming from the same occurrence, the second complaint again sought relief from Wal-Mart for negligence. Wal-Mart again removed the case to federal court, then filed a motion under Rule 41(d) for costs that it had incurred in the previously dismissed federal-court action.

On June 23, 1999, the district court granted Wal-Mart's Rule 41(d) motion. It thus ordered plaintiff to pay any court expenses and attorney fees that Wal-Mart had incurred in defending the original action that would not benefit the company in the second action. At the same time, the district court stayed the proceedings and gave plaintiff fourteen days to satisfy the terms of the order. On September 2, 1999, after plaintiff had failed to pay Wal-Mart's costs, the court dismissed the case without prejudice.

On appeal plaintiff challenged the district court's decision to include attorney fees in the Rule 41(d) order. In addressing the contention, the Sixth Circuit started by acknowledging the division of opinion among lower-court judges over the matter. "There is a split of authority," the court of appeals observed,

"as to whether Rule 41(d) authorizes attorney fees as part of an award of 'costs.'" App. 10a. *See also id.* ("The Sixth Circuit has recently recognized the split but declined to make a ruling: 'although . . . most courts have concluded that attorney fees may be awarded under Rule 41(d), the matter is far from settled in this circuit or in most others.'") (quoting *Duffy v. Ford Motors Co.*, 218 F.3d 623, 632 (6th Cir. 2000)).

While acknowledging "that the majority of courts find that attorney fees are available under Rule 41(d)," the Sixth Circuit ultimately decided to "hold that attorney fees are not available under Rule 41(d)." App. 10a. It did so for three reasons. One was the language of the Rule, which the court observed "does not explicitly provide for" fees but only generally mentions "costs." App. 10a. In the court's view, "[w]here Congress has intended to provide for an award of attorney fees, it has usually stated as much and not left the courts guessing." App. 10a. Second, it recognized "that an award of attorney fees may be authorized, even if not expressly provided for, 'if the statute otherwise evinces an intent to provide for such fees.'" App. 11a (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994)). But it found that "the structure of the Federal Rules of Civil Procedure is ambiguous at best on the question of attorney fees," in view of numerous other provisions that (unlike Rule 41) expressly refer to attorney fees. App. 11a-12a (citing Rules 30, 37 and 56, and 28 U.S.C. § 1920). In the absence of an "explicit[]" directive from Congress to provide for attorney fees in Rule 41(d), it did not find the "structure of the Civil Rules [] so unambiguous that can we divine a contrary intent on the part of Congress." App. 13a. Third, it found unpersuasive the reasoning of the "many courts" that have awarded attorney fees under Rule 41(d). These other courts, the Sixth Circuit believed, either rely too heavily on "the policy behind the rule" at the expense of its "plain language," or rely on the "parallelism" between Rule 41(d) and Rule 41(a)(2) which has been construed to authorize a court to condition voluntary dismissal without prejudice on payment of attorney

fees. Against this backdrop, the court felt that it would have "to essentially re-draft the rule" to provide for attorney fees not "explicitly" permitted by the rule. App. 12a-13a.

REASONS FOR GRANTING THE WRIT

Each of the customary explanations for granting the writ applies here. This construction of Rule 41(d), as the Sixth Circuit itself recognized, implicates "a split of authority" in the lower courts and ultimately differs from what "the majority of courts" have done. App. 10a. The decision is wrong because it creates a clear-statement requirement for awarding attorney fees when no such requirement exists. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994). And the decision raises an important federal question, as illustrated by the large number of lower-court decisions construing the Rule, to say nothing of the legal commentators who have addressed the point. *See, e.g.*, Edward X. Clinton, Jr., *Does Rule 41(d) Authorize an Award of Attorney's Fees?*, 71 St. John's L. Rev. 81 (1997).

I. A Mature Division of Authority Exists Over The Question Presented.

The Sixth Circuit was assuredly correct in at least one respect regarding this case. In recognizing that "[t]here is a split of authority as to whether Rule 41(d) authorizes attorney fees as part of an award of 'costs,'" App. 10a, the appellate court correctly sized up the lower-court record. *See also id.* ("The Sixth Circuit has recently recognized the split but declined to make a ruling") (citing *Duffy v. Ford Motor*, *supra*).

Over the past two decades, three schools of thought have emerged regarding the propriety of awarding attorney fees under Rule 41(d). The first, represented by the Sixth Circuit in the decision below, ostensibly focuses on the "plain language" of the provision. App. 10a-11a. In its view, "[w]here Congress has intended to provide for an award of attorney

fees, it has usually stated as much and not left the courts guessing." *Id.* at 10a. Also, because several other provisions of federal law explicitly provide for attorney fees—*see, e.g.*, Federal Rules of Civil Procedure 30(g)(2), 37(a)(4), 37(c), 37(d), 56(g), 28 U.S.C. § 1920—the Sixth Circuit believed that the absence of any such provision in Rule 41(d) establishes that such fees are not authorized. No other circuit subscribes to this view.

The second school of thought holds that district courts have discretion to award attorney fees as part of the costs that Rule 41(d) allows. These cases focus on the discretionary language of Rule 41(d), which authorizes district courts to award any costs that they "may deem proper." Adhering to this majority view are at least two courts of appeal, and countless district courts. The first appellate court is the Eighth Circuit. *See Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th Cir. 1980) (district courts have authority to award fees under Rule 41(d)); *Johnston v. Cartwright*, 355 F.2d 32, 40 (8th Cir. 1966) (same); *Mercantile-Commerce Bank & Trust Co. v. Southeast Ark. Levee Dist.*, 106 F.2d 966, 971 (8th Cir. 1939) ("in exceptional cases for dominating reasons" a trial court may award the prevailing party attorney's fees as part of the costs incurred under Rule 41(d)). The second is the Tenth Circuit. *See Meredith v. Stovall*, 216 F.3d 1087, 2000 WL 807355, at *1 (10th Cir. June 23, 2000) ("Under the language of Rule 41(d), the decision whether to impose costs and attorney's fees is within the discretion of the trial court"); *cf. Nolen v. Henderson Nat'l Corp.*, 986 F.2d 1428, 1993 WL 26817, at *4 (10th Cir. Feb. 5, 1993) ("Though a defendant may recover fees and costs with respect to a dismissal without prejudice, it cannot recover them where the dismissal is with prejudice barring exceptional circumstances") (construing Rule 41(a)).

In addition to these appellate courts, several district courts from these circuits and others have issued thoughtful opinions

explaining why trial courts retain discretion to make such awards. In *Behrle v. Olshansky*, 139 F.R.D. 370, 372-77 (W.D. Ark. 1991), the trial court carefully reviewed the case law in the area, ultimately determining that it had discretion to award fees for at least two reasons. One, it did not believe that the discretion vested in district courts under Rule 41(a) to condition the voluntary dismissal of an action on payment of fees "is different" from "that given to the court by Rule 41(d)." *Id.* at 373. The authorization of fee awards in the one setting carried over to the other. Two, the court thought that it made scant sense to treat the "costs" covered by Rule 41(d) as "exactly the same items of expense" as are taxed by the clerk of the court against the losing party under Rule 54(d). *Id.* at 373.

A like conclusion was reached in *Esquivel v. Arau*, 913 F. Supp. 1382 (C.D. Cal. 1996). "The fact that Rule 41(a)(2) has been a basis to impose fee award 'conditions' lends support to the proposition that Rule 41(d) 'costs' awards should also include attorneys' fees." *Id.* at 1391. Similar reasoning has been embraced by a host of other districts courts. *See Loubier v. Modern Acoustics, Inc.*, 178 F.R.D. 17, 22-23 (D. Conn. 1998) (awarding fees under Rule 41(d) because the rule is "discretionary" and because "the courts have generally allowed the recovery of attorney's fees as part of the costs"); *Katen v. Katen*, 1998 WL 721092, at *2 (E.D.N.C. Mar. 4, 1998) ("The language of the Rule is permissive, and allows the court to award costs 'as it may deem proper.' In light of the Rule's purpose, to deter vexatious and repetitive litigation, it seems proper that in certain circumstances, attorneys' fees should be taxed against the party seeking to refile a previously dismissed suit."); *Zucker v. Katz*, 708 F. Supp. 525, 539 (S.D.N.Y. 1989) (award under Rule 41(d) is "discretionary with the court"); *Whitehead v. Miller Brewing Co.*, 126 F.R.D. 581 (M.D. Ga. 1989); *Wahl v. City of Wichita*, 701 F. Supp. 1530, 1533 (D. Kan. 1988) (agreeing that trial courts have "broad discretion" to award costs and attorney fees under Rule 41(d) but

declining to award them in the case); *Eager v. Kain*, 158 F. Supp. 222, 223 (E.D. Tenn. 1957) ("if a plaintiff has once dismissed an action in any court, upon the commencement of an action including the same claim in a federal court, the court may require the payment of costs, including attorney's fees, of the previously dismissed action as a prerequisite to the filing of the action"). *See also Romero v. Universal Ogden Servs., Inc.*, No. 97-2744, 1997 WL 639011 (E.D. La. Oct. 15, 1997) (awarding attorney fees and costs under Rule 41(d)); *Kratage v. The Charter Township of Commerce*, 926 F. Supp. 102, 104 n.1 (E.D. Mich. 1996); *Int'l Controls & Measurements Corp. v. Watsco*, 853 F. Supp. 585, 592 (N.D.N.Y. 1994) (agreeing that Rule 41(d) "provides that the court has discretion to award . . . costs and fees" but declining to do so); *Goodrum v. United States*, 1993 WL 432346, at *1 (E.D. La. Oct. 14, 1993) ("Reasonable attorney's fees may be included in 'cost' imposed upon a plaintiff" pursuant to Rule 41(d)); *In re Wy. Tight Sands Antitrust Cases*, 121 F.R.D. 685, 688 (D. Kan. 1987) (including attorney fees as part of costs award under Rule 41(d)); *N.Y. Gold & Silver Futures Exch. v. Sec. Div., N.Y. State Attorney Gen.'s Office*, 1986 WL 2417, at *2 (S.D.N.Y. Feb. 18, 1986) ("Pursuant to Fed.R.Civ.P. 41(d), plaintiff is assessed reasonable costs, including attorney fees").

Still a third school of thought exists regarding this issue. These courts look less to the language of Rule 41(d), Rule 41(a) or other contextual clues, and more to whether the underlying cause of action independently authorizes attorney fees for the successful litigant. In *Esposito v. Piatrowski*, 223 F.3d 497 (7th Cir. 2000), for example, the Seventh Circuit reviewed a case in which the district court had awarded costs under Rule 41(d) that "included the payment of attorneys' fees." *Id.* at 500. On appeal, the repeat litigant argued that the district court had committed reversible error in compelling him to pay these costs before proceeding with the second complaint, and that the court further erred in eventually

dismissing his second case when he did not satisfy the terms of the order.

The Seventh Circuit disagreed. It first observed that "[t]here is no language in the text of Rule 41(d) indicating that Congress intended to alter the 'American Rule' as the rule does not refer to attorneys' fees as an awardable cost." *Id.* at 500. In that setting, the court reasoned, it would allow attorney fees only when the statute under which the claim was brought specifically permitted them. In the court's words, "we hold that a party may recover reasonable attorneys' fees as part of its 'costs' under Rule 41(d) only where the underlying statute defines costs to include attorneys' fees." *Id.* at 501.

Despite the court's characterization of its decision as a "hold[ing]," *id.*, its lengthy discussion of the issue, *id.* at 499-502, and its reliance on a prior Seventh Circuit decision in reaching this decision, *see Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987), it is not altogether clear that the decision indeed amounts to a holding. *See* 223 F.3d at 501 (noting that the appellant challenged the entire costs award, not just the award of attorney fees). Any doubt about the controlling nature of *Esposito* within the Seventh Circuit, however, was removed four months later when the court relied on the decision in resolving a similar issue and indeed did not even find it necessary to publish the decision. In *Sanderson v. Spectrum Labs, Inc.*, No. 00-1872, 2000 WL 1909678 (7th Cir. Dec. 29, 2000), the court held that "[a]ttorneys' fees are generally not recoverable in the absence of an underlying statute or contract provision stating otherwise." *Id.* at *5 (citing *Esposito*). It then determined that because plaintiff had relied on the Lanham Act in bringing his claim and because the Act "provides for an award of attorneys' fees as part of a successful litigant's costs," it would "affirm the district court's award of attorneys' fees under Rule 41(d)." *Id.* Plainly, in this instance, the *Esposito* reasoning was necessary to the result. At least one lower court from another circuit has embraced this

view. *See Anders v. FPA Corp.*, 164 F.R.D. 383, 388-91 ("Since the legal authority governing the state action which gave rise to the Rule 41(d) award does not allow for the shifting of attorney's fees, this Court concludes that the costs awarded under Rule 41(d) in this instance do not include attorney's fees"), *order aff'd by* 1995 WL 785109, at *3 (D.N.J. Apr. 24, 1995) ("where the underlying substantive claim permits recovery of attorney's fees for the successful litigant . . . costs may include such attorney's fees as costs, but not otherwise").

All told, at least four courts of appeals have taken a stand on the issue presented, together with numerous district courts in other circuits. The split is recurring in nature and mature in its development. Even under the most forbearing application of the lower-court conflict considerations of Rule 10, this federal issue is ripe for review.

II. The Sixth Circuit Erred in Concluding that the Plain Language of Rule 41(d) Deprives District Courts of Discretion to Award Attorney Fees.

Not only did the Sixth Circuit's decision deepen a pre-existing division in the lower courts, but it also incorrectly concluded that the "plain language" of Rule 41(d) precludes district courts from conditioning the refiling of a complaint on the payment of attorney fees. This, too, supports the writ.

In issuing a ruling in conflict with "the majority of courts" (App. 10a) that have addressed the question, the Sixth Circuit claimed that the "plain language" of Rule 41(d) required it to do so. That is not the case. Language, context, and the animating purpose of Rule 41(d) all establish that district courts may condition the refiling of a complaint on the payment of *all* costs incurred by the defendant in the first action, including all attorney fees prompted by the first complaint.

By its terms, Rule 41(d) empowers district courts with broad discretion to deter and penalize vexatious litigants. In full, it says:

> If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Fed. R. Civ. P. 41(d).

To the extent plain language is the sole measure of this issue, the term "costs" hardly has the restrictive quality that the Sixth Circuit gave it. General as well as more specific definitions of the term clearly cover attorney fees. As a general matter, the term means "the amount or equivalent paid or given or charged or engaged to be paid or given for anything bought or taken in barter or for service rendered." Webster's Third New International Dictionary 515 (1981). And in the legal context, the term means an "expense incurred in litigation: as a: those payable to the attorney or counsel by his client esp. when fixed by law." *Id.* Legal dictionaries likewise say that the term means "the amount paid or charged for something," or "[t]he expenses of litigation, prosecution, or other legal transaction, esp. those allowed in favor of one party against the other." Black's Law Dictionary 349, 350 (7th ed. 1999). Surely a request for legal fees in defending an initial (and ultimately frivolous) action may fairly be characterized as "the expenses of litigation," "the amount paid or charged for something," or more broadly "the amount or equivalent paid or given or charged or engaged to be paid or given for anything."

As an initial matter, then, the court of appeals erred in holding that Rule 41(d) does not permit attorney fees because

"the rule does not explicitly provide for them." By any definition of "costs," the Rule in fact does provide for them.

In reaching a contrary interpretation, it appears that the court of appeals in reality did not rely upon the "plain language" of Rule 41(d) (*see* App. 10a-13a) but rather upon the *context* in which that Rule appears. As the lower court elsewhere indicated: "Where Congress has intended to provide for an award of attorney fees, it has usually stated as much and not left the courts guessing." App. 10a. It then noted that while "Rule 41(d) only speaks of 'costs' and does not mention attorney fees, several other provisions in the Federal Rules explicitly provide for recovery of attorney fees." App. 11a (citing Rules 30(g)(2), 37(a)(4), 37(c), 37(d) & 56(g)).

This consideration of the context in which Rule 41(d) appears of course asks an appropriate statutory-interpretation question, but in the end supplies an inaccurate answer to it. No doubt the definition of "costs" may be informed by "the company it keeps" and the context in which it appears. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); *see Gutierrez v. Ada*, 120 S. Ct. 740 (2000). But the first essential inquiry is whether other portions of *Rule 41*, not other separate Federal Rules or other separate Acts, offer any insight into the meaning of the term. One first ascertains the relational meaning of a term by looking at its siblings, not its second cousins. *Cf. United States v. Cooper Corp.*, 312 U.S. 600, 606-07 (1941) ("[t]he connotation of a term in one portion of an Act may often be clarified by reference to its use in others"). And here other aspects of Rule 41(d) and other subsections of the Rule confirm what the dictionaries indicate—the term "costs" includes all expenses, including attorney fees.

The Sixth Circuit's cramped interpretation of "costs" for example cannot be squared with the discretion-giving language that animates Rule 41(d). It says that "the court *may* make such order for the payment of costs of the action previously

dismissed as it may deem proper and *may* stay *the proceedings* in the action until the plaintiff has complied with the order." (Emphasis added). It would require an odd construction of the Rule to believe that it initially vested the district courts with such broad discretion on the one hand, then took it away with the other by defining costs to cover the most narrow and most inconsequential of categories. All lower courts agree that "the purpose of Rule 41(d) . . . [was] to deter forum shopping and vexatious litigation," *Esposito*, 223 F.3d at 501 (citation omitted), and of course vexatious litigation is far more likely to spark an increase in attorney fees than filing fees and other litigation expenses. Yet under the Sixth Circuit's view, the more vexatious the first round of litigation the less likely that the defendant will recover all of its out-of-pocket expenses. That cannot be what the drafters of the Rule had in mind.

A second contextual clue bolsters this construction. Rule 41(a) allows plaintiffs voluntarily to dismiss their claims without prejudice in two situations—(1) without an order of the court by filing a notice of dismissal before an answer (or dispositive motion) has been filed or with the consent of all parties, and (2) with permission of the court. Fed. R. Civ. P. 41(a). In the latter circumstance, the court may dismiss the case without prejudice "upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2). This broad language, all courts have agreed, allows trial courts to condition the dismissal of the case upon the payment of costs *and* attorney fees. *See LeBlang Motors, Ltd. v. Subaru of Am., Inc.*, 148 F.3d 680, 686-87 (7th Cir. 1998); *Painter v. Golden Rule Ins. Co.*, 121 F.3d 436, 440-41 (8th Cir. 1997); *AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1528 (10th Cir. 1997); *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir. 1996); *Marlow v. Winston & Strawn*, 19 F.3d 300, 303 (7th Cir. 1994); *McLaughlin v. Cheshire*, 676 F.2d 855, 856-57 (D.C. Cir. 1982); *GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 367 (D.C. Cir. 1981); *Am. Cyanamid Co. v. McGhee*, 317 F.2d 295, 298 (5th Cir. 1963); 8 Moore's

Federal Practice, § 41.70(6). *See* Advisory Committee Notes to 1946 Amendment to Rule 41 (requiring court approval of dismissal not only after defendants file an answer but also after they file a summary judgment motion "[s]ince such a motion may require even more research and preparation than the answer itself").

Under these circumstances, it would be surpassingly strange to credit the drafters of Rule 41 simultaneously with empowering district courts with broad authority to condition a dismissal upon the payment of fees, then with no discretion regarding the payment of fees when the second action in fact *is* filed. One concerned with the former situation (the need to award fees when a second action *may* be filed) would assuredly be concerned with the latter situation (the need to award fees when a second action *has* been filed). *See Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994) (recognizing attorney fees may be permitted under the Federal Rules even when they are not expressly provided for "if the statute otherwise evinces an intent to provide for such fees").

Nor does the "American Rule" support the Sixth Circuit's decision. First, contrary to the appellate court's assumption, it is exceedingly doubtful that the assumption behind the American Rule—that successful and unsuccessful litigants will bear their own attorney fees—applies here. The question in this case is not the traditional one presented in attorney-fee disputes: Is there authority for shifting fees from the loser to the winner after the case has ended? *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Here, fees are imposed *before* the court knows who the eventual winner will be, and immediately *after* the plaintiff files a second action. This in short is not an attempt to import the British loser-pay rule. It is an attempt to deter litigation tactics that are either vexatious or tactical, or in some instances both. Here, for example, even the Sixth Circuit noted that plaintiff's decision to dismiss the first case "after she had missed the

court's deadline for disclosing her expert witnesses . . . evidences at least some attempt to wipe the slate clean after an initial setback in federal court and gain a tactical advantage by re-filing." App. 10a. On this record, a fee-shifting rule has nothing to do with the American, British or any other common-law assumption. It instead is a concrete way of assuring that litigants allowed voluntarily to dismiss their cases may not refile the case solely to gain an advantage in the underlying litigation.

All things considered, the Sixth Circuit erred. The language of the Rule, the context in which it appears and the function it serves all confirm that Rule 41(d) permits an award of attorney fees. This mistake independently supports the writ.

III. The Question Presented Is Recurring in Nature and Its Proper Resolution Will Provide an Important Litigation-Management Tool to the Lower Courts.

Besides implicating a question that has divided the lower courts and besides answering that question incorrectly, the Sixth Circuit's decision addresses an issue that affects the day-to-day functioning of the lower courts and whose resolution will eliminate an uncertainty in the law that has lasted for more than six decades. The question should be addressed now rather than later.

Rule 41(d) dates from 1938. Not only has the Court failed to address the contours of the Rule since then but it has not even had an opportunity to do so. To our knowledge, not a single certiorari petition has been presented to the Court regarding this issue during that time. A brief examination of the facts of this case explains why.

The award in this case totals just $1,766.55—$185.00 in costs and $1,581.55 in attorney fees. The other lower-court cases in this area involve equally modest awards. The size of these awards not only explains why no other certiorari petitions

have been filed but also explains why there are so many more district court opinions regarding this issue than there are court of appeals decisions. Few litigants will find it cost-effective to contest an issue at the court of appeals when the expenses of one layer of appellate review frequently will dwarf the award itself.

But this truth does not undermine the significance of the issue or its importance to the lower courts; it merely explains why more lower-court decisions do not proceed through the appellate system. If not now, moreover, it is fair to ask when the Court will be presented with an opportunity to review this question. One certiorari petition in 63 years does not bode well for future opportunities to resolve a question that the Sixth Circuit itself acknowledged has created "a split of authority." App. 10a.

Money alone, at any rate, has never been the sole (or even the best) harbinger of Supreme Court review. The fact is, one district court after another has found uncertainty in this area when by now there ought to be clarity. *See Anders*, 164 F.R.D. at 389 ("[T]here is a paucity of case law on the interpretation of the language of Rule 41(d)"); *Behrle*, 139 F.R.D. at 374 ("There is a dearth of case law on this issue"); *Esquivel*, 913 F. Supp. at 1390 (observing that "there is a puzzling lack of discussion in the cases of the theoretical underpinnings for such an award" under Rule 41(d)). And in an age when the meek and brazen alike are calling on the courts to resolve all manner of social, political and business disputes, it is difficult to perceive the virtues of allowing that uncertainty to persist—particularly when it comes to a provision that all agree was designed to eliminate vexatious litigation tactics. Yet, today, all trial judges within the Sixth Circuit will not be able to use the most formidable weapon against such tactics—the threat of attorney-fee awards. It is doubtful whether a single sharp-edged litigant will find the

possibility of a Rule 41(d) sanction that does not include such expenses to be a threat of any meaningful consequence at all.

Nor has the confusion generated by this uncertainty escaped the notice of legal commentators. One law review article has been devoted exclusively to the issue, while several others have noted the lack of resolution regarding it. *See* Clinton, *Does Rule 41(d) Authorize an Award of Attorney's Fees?* 71 St. John's L. Rev. 81 (1997); Jane P. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C. L. Rev. 613, 644 (1983); Rochelle Cooper Dreyfuss, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Award Act*, 80 Colum. L. Rev. 346, 349 (1980); Joseph C. Kopec, Note, *The Use of Rule 11 Sanctions and Prevailing Party Fee-Shifting Statutes After Rule 41(a)(1)(i) Notice Dismissal*, 88 Colum. L. Rev. 1512, 1526 (1988) (discussing the interplay between Rule 54(d)'s costs and attorney fees provisions and Rule 41(d)).

In the last analysis, this petition cleanly presents the issue, involves a square holding on point and allows the Court to address the question in precisely the context in which it most frequently arises. It is hard to see a tenable justification for allowing this uncertainty in the law to continue, and even less justification for assuming that other opportunities will arise shortly to address it.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-6348

SHIRLEY K. ROGERS,
Plaintiff - Appellant,
v.

WAL-MART STORES, INC.,
Defendant - Appellee.

Before: GUY and MOORE, Circuit Judges;
DOWD, District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Tennessee at Memphis.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court denying plaintiff Shirley Rogers's motion to remand is AFFIRMED and the court's award of costs insofar as it awarded attorney fees is VACATED. IT IS FURTHER ORDERED that the case is REMANDED for further proceedings in accordance with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Dated: October 26, 2000

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHIRLEY K. ROGERS,
Plaintiff-Appellant,

v.

WAL-MART STORES, INC.,
Defendant-Appellee.
No. 99-6348

Decided Oct. 26, 2000

DOWD, District Judge.

I. Introduction

This case arises out of injuries suffered by Shirley K. Rogers when she tripped and fell on a wooden pallet located in the aisle of a Wal-Mart store in Memphis, Tennessee. Rogers contends that employees of Wal-Mart acted negligently in leaving the pallet in a shopping area.

On October 17, 1997, Rogers filed a complaint in Tennessee state court asserting her negligence claims and seeking approximately $950,000 in damages. On November 18, 1997, Wal-Mart answered and removed to the United States District Court for the Western District of Tennessee on the grounds of complete diversity among the parties and an amount in controversy exceeding $75,000. On October 9, 1998, the parties stipulated to dismissal, and on October 14, 1998, the district court entered an order dismissing the case without prejudice.

On February 4, 1999, Rogers filed a new complaint in Tennessee state court. The second complaint, arising out of the same occurrence, specified that Rogers sought to recover an amount "not exceeding $75,000." Wal-Mart filed another

notice of removal based on answers to interrogatories in the first case in which Rogers estimated her damages at $447,000. Rogers filed a motion to remand on May 14, 1999, asserting that the amount-in-controversy requirement for diversity jurisdiction had not been met. Along with her motion to remand, Rogers submitted an affidavit stating that she "had no intention of seeking additional damages against Wal-Mart Stores, Inc." and that she had "instructed [her] attorney to stipulate that [her] demand for damages will not exceed $75,000 at any time in the future." Rogers also attached a stipulation admitting that her total damages did not exceed $75,000 and stating that she would not seek leave of court to amend her complaint for additional damages. Meanwhile, Wal-Mart moved the district court, pursuant to Fed. R. Civ. P. 41(d), to award costs and fees for the previously dismissed action.

The district court denied Rogers' motion to remand on June 23, 1999. On the same day, the district court granted Wal-Mart's Rule 41(d) motion and ordered Rogers to pay costs and attorney fees from the original action representing work that would not benefit Wal-Mart in the second action. The district court also stayed the proceedings and gave Rogers fourteen days to pay Wal-Mart the costs and fees. On September 2, 1999, the district court dismissed the case without prejudice due to Rogers' non-payment of Wal-Mart's costs and fees from the first action.

Rogers has appealed the district court's June 23, 1999 Order denying her motion to remand; its Order of June 23, 1999 granting costs under Fed. R. Civ. P. 41(d); and its Order and Judgment entered on September 2, 1999 dismissing the case without prejudice with costs taxed to the plaintiff.

II. Removal

We review *de novo* the existence of subject matter jurisdiction as a question of law; factual determinations

regarding jurisdictional issues are reviewed for clear error. *See Gafford v. General Elec. Co.*, 997 F.2d 150, 155 (6th Cir. 1993). We also review *de novo* the denial of a motion to remand. *See Ahearn v. Charter Twp. of Bloomfield*, 100 F.3d 451, 453 (6th Cir. 1996).

Generally, a civil case brought in a state court may be removed by a defendant to federal court if it could have been brought there originally. 28 U.S.C. § 1441(a). A federal district court has original "diversity" jurisdiction where the suit is between citizens of different states and the amount in controversy exceeds $75,000, exclusive of costs and interest. 28 U.S.C. 1332(a). A defendant removing a case has the burden of proving the diversity jurisdiction requirements. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921).

A problem arises where, as here, a plaintiff alleges an amount in controversy below the jurisdictional amount. Generally, because the plaintiff is "master of the claim," a claim specifically less than the federal requirement should preclude removal. *See Gafford v. General Elec. Co.*, 997 F.2d 150, 157 (6th Cir. 1993). State counterparts to Fed. R. Civ. P. 54(c) might enable a plaintiff to claim in her complaint an amount lower than the federal amount in controversy but nevertheless seek and recover damages exceeding the amount prayed for. *Id.* Tennessee has one such rule. Its Civil Procedure Rule 54.03 provides that, except in the case of default, "every final judgment shall grant relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." In such situations, the removing defendant must show that it is "more likely than not" that the plaintiff's claims meet the amount in controversy requirement. *Gafford*, 997 F.2d at 158.

To meet its burden for removal, the defendant in this case relied on the fact that plaintiff's first action sought nearly $1 million and that plaintiff made sworn responses to discovery requests stating that her amount of damages exceeded

$447,000. The district court cited these facts in finding that it was more likely than not that the amount in controversy exceeded $75,000. Rogers, however, argues that the district court should have granted her motion to remand because she (1) filed a complaint in the second action seeking damages under the jurisdictional amount; and (2) stipulated that her damages were under the required amount in controversy for diversity jurisdiction.

Neither of these facts suffices to require a remand to state court. This circuit has recognized a rule that the determination of federal jurisdiction in a diversity case is made as of the time of removal. *See Ahearn v. Charter Twp. of Bloomfield*, 100 F.3d 451, 453 (6th Cir. 1996). Hence, in reviewing the denial of a motion to remand, a court looks to "whether the action was properly removed in the first place." *Id.* (citing *Fakouri v. Pizza Hut of Am., Inc.*, 824 F.2d 470, 472 (6th Cir. 1987)). If one does not take into account plaintiff's post-removal stipulation, then there is no question that the district court was correct to deny the motion to remand because defendant showed that, at the time of removal, the amount in controversy was "more likely than not" above the $75,000 pleaded in plaintiff's complaint.[1]

Therefore, the main issue here is the effect, if any, of plaintiff's stipulation. The Seventh Circuit has held that a post-removal stipulation reducing the amount in controversy to below the required jurisdictional amount is ineffective to deprive a district court of jurisdiction. *See In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992). The court based its decision

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[1] Plaintiff argues that if the amount prayed for in a complaint may be disregarded in determining the amount in controversy, it would "open the floodgates" to federal jurisdiction over any cases filed in state court. This argument has long since been settled by cases like *Gafford*, which establish tests for determining when a court can find jurisdiction despite a pleading that states an amount below the required level.

on *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938), in which the Supreme Court considered whether a post-removal amendment of a complaint could destroy diversity jurisdiction. In ruling that it could not, the *St. Paul* Court stated that "[e]vents occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction." *Id.* at 290. On the strength of this rule, the *Shell Oil* court reasoned that "because jurisdiction is determined as of the instant of removal, a post-removal affidavit or stipulation is no more effective than a post-removal amendment of the complaint." 970 F.2d at 356; *see also Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424, 429 (7th Cir. 1997) ("because the stipulation came one month post-removal, [it was] too late for the court to consider").

Although no published opinion of this circuit has directly addressed the effect of a post-removal stipulation on diversity jurisdiction, in *Sanford v. Gardenour*, No. 99-5504, 2000 WL 1033025 (6th Cir. July 17, 2000), the court found there was jurisdiction even though the plaintiffs had stipulated after removal that "the amount they were seeking was less than $75,000." *Id.* at *2. The plaintiffs had made Rule 26 disclosures that the amount of damages was about $500,000. In addition, the plaintiffs' stipulation had not been binding—a fact the court used to distinguish its case from several district court cases that had given effect to a binding post-removal stipulation. *Id.* at *3. Also, in *Mitchell v. White Castle Sys., Inc.*, No. 94-1193, 1996 WL 279863 (6th Cir. May 24, 1996), although noting that the plaintiff had offered to file a post-removal stipulation, the court interpreted *St. Paul* as holding that "a post-removal stipulation has no effect on federal jurisdiction over the original complaint." *Id.* at **2 n.2.

We conclude that post-removal stipulations do not create an exception to the rule articulated in *St. Paul*. Because jurisdiction is determined as of the time of removal, events

occurring after removal that reduce the amount in controversy do not oust jurisdiction. Therefore, consistent with *St. Paul* and previous unpublished Sixth Circuit opinions, we hold that a post-removal stipulation reducing the amount in controversy to below the jurisdictional limit does not require remand to state court. This rule is grounded not only in precedent, but also in sound policy. If plaintiffs were able to defeat jurisdiction by way of a post-removal stipulation, they could unfairly manipulate proceedings merely because their federal case begins to look unfavorable. Moreover, the interests of simplicity and uniformity dictate that post-removal stipulations be treated just like any other post-removal event.

Several district courts have given effect to binding, post-removal stipulations; however, we do not see merit in their reasoning. In *Moss v. Voyager Ins. Cos.*, 43 F. Supp. 2d 1298 (M.D. Ala. 1999), the court distinguished cases from the Fifth, Sixth and Seventh Circuits on the ground that the stipulations in those cases had "failed to specifically bind the plaintiffs to accept no more in damages than the requisite jurisdictional amount." *Id.* at 1302; *see also Adkins v. Gibson*, 906 F. Supp. 345 (S.D. W.Va. 1995). Reaching the same result with different reasoning, the courts in *Bailey v. Wal-Mart Stores, Inc.*, 981 F. Supp. 1415 (N.D. Ala. 1997) and *Goodman v. Wal-Mart Stores, Inc.*, 981 F. Supp. 1083 (M.D. Tenn. 1997) ruled that the 1988 amendments to 28 U.S.C. § 1447(c) superseded the *St. Paul* rule that post-removal actions by the plaintiff cannot deprive a court of diversity jurisdiction.[2] Those courts reasoned that in changing § 1447(c), Congress was responding to *St. Paul*. Further, they interpreted the word "shall" in the newer version to mandate remand—even where

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[2] The older version of § 1447(c) called for remand whenever the judge realized "that the case was removed improvidently and without jurisdiction." This subsection was changed to read: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

the plaintiff reduces his demand three days before trial or merely amends his complaint rather than submits a stipulation. *Bailey*, 981 F. Supp. at 1415; *Goodman*, 981 F. Supp. at 1084; *see also Oder v. Buckeye State Mut. Ins.*, 817 F. Supp. 1413, 1414 (S.D. Ind. 1992).

Although these cases are interesting for their result, this circuit has already rejected the notion that the 1988 amendment to § 1447(c) directs district courts to look beyond the time of removal in deciding remand motions based on lack of jurisdiction. *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1348 & n.11 (6th Cir. 1993); *see also Fuller v. Exxon Corp.*, 78 F. Supp. 2d 1289, 1297 n.16 (S.D. Ala. 1999) (discussing cases and concluding that the 1988 amendments do not supersede *St. Paul*). In addition, the fact that a stipulation might be binding should not determine whether it is effective to deprive the federal court of diversity jurisdiction. The same potential for forum shopping and manipulation exists whether or not a stipulation is binding. The same interests in efficiency and simplicity also exist where there is a binding stipulation. Hence, the reasoning that leads us to deny effect to post-removal stipulations generally, also leads us to deny effect to post-removal stipulations that are binding.[3]

Because state law would have allowed plaintiff to recover damages in excess of what she prayed for, it was "more likely than not" that her damages would exceed $75,000 given her previous demands and representations. Plaintiff's post-removal stipulation has no effect because jurisdiction is decided as of

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[3] The defendant has argued that its lack of approval means the stipulation is not binding. Other courts have treated such stipulations as binding nonetheless. *See, e.g., Asociacion Nacional de Pescadores a Pequena Escala O Artesanales de Colombia v. Dow Quimica de Colombia, S.A.*, 988 F.2d 559, 565 (5th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994); *Adkins v. Gibson*, 906 F. Supp. 345, 348 (S.D. W.V. 1995). We find defendant's argument unconvincing and do not rely on it.

the time of removal. The district court did not err in denying plaintiff's motion to remand.

III. The Award of Costs, Including Attorney Fees

The district court thoroughly examined Wal-Mart's itemized accounting of the costs and fees it incurred in defending against Rogers' earlier suit. The court awarded the full $185 in costs, but reduced the $1,888 of requested attorney fees by $306.45, to account for those fees which "remain[ed] of benefit in this matter[.]" The court ordered Rogers to pay Wal-Mart $1766.55. Rogers has contested this award of "costs" and the subsequent dismissal of her case.

Fed. R. Civ. P. 41(d) provides:

> If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

A district court's grant of a Rule 41(d) motion and related order of dismissal are reviewed for abuse of discretion. *See Duffy v. Ford Motor Co.*, 218 F.3d 623, 633 (6th Cir. 2000).

Rogers declares that she "merely wished to litigate her claims in state court" and relies on a couple of cases in which a court refused to award costs under Rule 41(d) because the court found no evidence of vexatious intent. *See Wahl v. City of Wichita*, 701 F. Supp. 1530, 1533 (D. Kan. 1988); *Sewell v. Wal-Mart Stores, Inc.*, 137 F.R.D. 28 (D. Kan. 1991). Rogers' claim of pure motive does not win the day because "nothing in the language of Rule 41(d) . . . suggests that a defendant must show 'bad faith' before a district court can order payment of costs incurred in a voluntarily dismissed previous action." *Esquival v. Arau*, 913 F. Supp. 1382, 1388 (C.D. Cal. 1996).

In addition, Rogers fails to mention that Rule 41(d) is meant not only to prevent vexatious litigation, but also to prevent forum shopping, "especially by plaintiffs who have suffered setbacks in one court and dismiss to try their luck somewhere else." *See Robinson v. Nelson*, No. 98-10802- MLW, 1999 WL 95720, at *2 (D. Mass. Feb. 18, 1999). Hence, Rule 41(d) is also intended to prevent attempts to "gain any tactical advantage by dismissing and refiling th[e] suit." *Sewell v. Wal-Mart Stores, Inc.*, 137 F.R.D. at 29.

As Wal-Mart points out, Rogers did not seek to dismiss the initial action until after she had missed the court's deadline for disclosing her expert witnesses. This evidences at least some attempt to wipe the slate clean after an initial setback in federal court and gain a tactical advantage by re-filing in state court. Hence, the district court did not abuse its discretion in awarding costs of $185 to Wal-Mart.

Rogers also specifically contests the district court's inclusion of attorney fees as part of its award of "costs" under Rule 41(d). There is a split of authority as to whether Rule 41(d) authorizes attorney fees as part of an award of "costs," but it seems that the majority of courts find that attorney fees are available under Rule 41(d). The Sixth Circuit has recently recognized the split but declined to make a ruling: "although . . . most courts have concluded that attorney fees may be awarded under Rule 41(d), the matter is far from settled in this circuit or in most others." *Duffy v. Ford Motor Co.*, 218 F.3d at 632.

We now hold that attorney fees are not available under Rule 41(d). The reason is simple—the rule does not explicitly provide for them. Where Congress has intended to provide for an award of attorney fees, it has usually stated as much and not left the courts guessing. Further, the law generally recognizes a difference between the terms "costs" and "attorney fees" and we have no desire to conflate the two terms. Rather, we must

assume that Congress was aware of the distinction and was careful with its words when it approved Rule 41(d).[4]

We realize that an award of attorney fees may be authorized, even if not expressly provided for, "if the statute otherwise evinces an intent to provide for such fees." *Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994). However, the structure of the Federal Rules of Civil Procedure is ambiguous at best on the question of attorney fees. For instance, whereas Rule 41(d) only speaks of "costs" and does not mention attorney fees, several other provisions in the Federal Rules explicitly provide for recovery of attorney fees.

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[4] Of course, we realize that Congress itself did not choose the words contained in the rule. The language actually resulted once Congress declined to exercise its veto power following the usual rule-making process. One commentator has described this process succinctly:

> . . . The Supreme Court has the power to "prescribe general rules of practice and procedure" for the federal courts, and the Judicial Conference of the United States has the authority to recommend rule changes to the Supreme Court. The Judicial Conference in turn oversees a committee structure that includes a Standing Committee on Rules of Practice and Procedure appointed by the Chief Justice of the Supreme Court and various advisory committees accountable to the Standing Committee. The Advisory Committee on Civil Rules, which consists of judges, lawyers, and legal academics, is responsible for the Federal Rules of Civil Procedure.
>
> There are several stages in the rulemaking process. A proposed rule is first considered by the Advisory Committee. If the Advisory Committee approves the proposal, it is then reviewed by the Standing Committee and finally by the Judicial Conference before being forwarded to the Supreme Court. If the Supreme Court concurs, the proposal is transmitted to Congress, which then has roughly seven months to exercise a veto. In the absence of a veto, the proposed rule goes into effect.

Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 Geo. L.J. 887, 892-93 (footnotes omitted).

See Simeone v. First Bank Nat'l. Ass'n, 125 F.R.D. 150, 155 (D. Minn. 1989) (listing Fed. R. Civ. P. 30(g)(2), 37(a)(4), 37(c), 37(d) & 56(g)). In addition, Title 28 U.S.C. § 1920 lists the items a court may tax as "costs" to a prevailing party under Rule 54(d) but does not include attorney fees. *Id.*; *see also Anders v. FPA Corp.*, 164 F.R.D. 383, 390 (D.N.J. 1995) (denying attorney fees in part because of lack of express authorization). The non-inclusion of attorney fees under § 1920 indicates that, at least in some contexts, Congress does not consider attorney fees to be part of an award of "costs."

Of course, many courts have permitted an award of attorney fees under Rule 41(d). They often rely on what they consider to be the policy behind the rule and, in our view, give too little weight to its plain language. *See, e.g., Behrle v. Olshansky*, 139 F.R.D. 370, 372-73 (W.D. Ark. 1991). In addition, some courts find attorney fees available under Rule 41(d) because, in their view, there ought to be a certain parallelism between Rule 41(d) and Rule 41(a)(2), which also does not explicitly mention attorney fees. In *Esquival v. Arau*, 913 F. Supp. 1382, 1391 (C.D. Cal. 1996), for instance, the court reasoned that because Rule 41(a)(2) permits a court to condition voluntary dismissal without prejudice on payment of attorney fees, Rule 41(d) also ought to permit attorney fees. The reasoning is that because both rules are intended to prevent vexatious litigation and forum shopping, "it would be inconsistent to conclude that a court has discretion to condition Rule 41(a)(2) voluntary dismissal without prejudice on payment of attorney fees, but that a court does not have discretion to exact the same payment from a plaintiff who has noticed a Rule 41(a)(1) dismissal in a previous case." *Esquival*, 913 F. Supp. at 1391.

One commentator accounts for this "anomaly" by suggesting that Rule 41(a)(2) contemplates a negotiation between the court and the litigant, but Rule 41(d) does not. Hence, these two rules are meant to "operate differently." *See*

Edward X. Clinton, Jr., *Does Rule 41(d) Authorize an Award of Attorney's Fees?*, 71 St. John's L. Rev. 81, 86 (1997). We do not hang our hat on this rationale; but we note it as further evidence that the structure of the Federal Rules of Civil Procedure is not so clear on this issue that it overcomes the absence of an express provision for attorney fees in Rule 41(d). In short, we are persuaded by the fact that Congress did not explicitly provide for attorney fees in Rule 41(d). We do not find that the structure of the Civil Rules is so unambiguous that we can divine a contrary intent on the part of Congress. And we think it improper to essentially re-draft the rule ourselves by reading into it language that is not there.

For these reasons, that portion of the district court's order which awarded Wal-Mart $1581.55 in attorney fees cannot stand.

IV. Conclusion

We AFFIRM the district court's denial of the motion to remand and we VACATE the district court's award of costs insofar as it awarded attorney fees. Further, we REMAND with instructions for the district court to enter an order that, upon payment of costs in the sum of $185 within thirty (30) days of the date of the district court's order, plaintiff's case will be reinstated on the district court docket.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SHIRLEY K. ROGERS,

VS

WAL-MART STORES, INC.

JUDGMENT IN A CIVIL CASE

CASE NO. 99-2342 M1/A

DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that, in accordance with the Order of Dismissal Without Prejudice filed September 2, 1999, this case is DISMISSED without prejudice with costs taxed to the Plaintiff, Shirley K. Rogers.

APPROVED:

/s/ Jon P. McCalla
JON PHIPPS MCCALLA
UNITED STATES
DISTRICT COURT

9/2/99
Date

ROBERT R. DI TROLIO
Clerk of Court

[illegible]
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SHIRLEY K. ROGERS,

Plaintiff,

vs. No. 99-2342 M1/A
JURY DEMANDED

WAL-MART STORES, INC.,

Defendant.

ORDER DISMISSING CASE
WITHOUT PREJUDICE

As the Court instructed in its June 23, 1999 Order in this matter, Defendant, Wal-Mart Stores, Inc., has filed an itemized accounting of the costs and fees it incurred in defending against an earlier suit of Plaintiff Shirley K. Rogers.

On August 16, 1999, this Court instructed Plaintiff to Pay Defendant $1,766.55 within fourteen days on the entry of the Order and notify the Court that she has made payment or the Court will dismiss the matter without prejudice.

As Plaintiff has not paid Defendant the aforementioned amount and the fourteen day period has passed, in accordance with this Court's earlier ruling, this case is hereby dismissed with Costs taxed to Plaintiff.

So ORDERED this the 2 day of Sept., 1999.

/s/ Jon P. McCalla
JON PHIPPS McCALLA
U.S. DISTRICT
COURT JUDGE

PREPARED BY:

/s/ Cameron C. Jehl
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SHIRLEY K. ROGERS,	)	
Plaintiff,	)	
vs.	)	No. 99-2342 M1/A
WAL-MART STORES, INC.,	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION

This matter is before the Court on Defendant Wal-Mart's motion for costs and for a stay pursuant to Federal Rule of Civil Procedure 41(d). For the reasons stated, the Court GRANTS the motion.

On October 17, 1997, Plaintiff Shirley K. Rogers filed a tort action governed by Tennessee law in a Tennessee court. As Plaintiff sought damages well in excess of $75,000 and complete diversity of the parties existed, Defendant Wal-Mart Stores removed the matter to this Court on November 18, 1997. After Defendant filed its answer in this matter, the parties submitted a Stipulation of Dismissal Without Prejudice on October 9, 1998. Accordingly, the Court dismissed the matter on October 14, 1998.

Plaintiff subsequently refiled her suit in state court. The second complaint was essentially identical to the first, except this time she only claimed damages of $75,000. Defendant again removed the matter to this Court where, for the reasons

discussed at June 8, 1999 conference in this matter, the Court denied Plaintiff's remand motion and determined that it had subject matter jurisdiction over the complaint.

Rule 41(d) of the Federal Rules of Civil Procedure provides:

> **Costs of Previously-Dismissed Action.** If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Pursuant to this section, Defendant seeks an award of costs and an order staying the action until Plaintiff complies with that order.

An award under this rule lies within the sound discretion of the trial court. Hython v. City of Steubenville, 94 F.3d 644, 1996 WL 456032, at *1 (6th Cir. Aug. 12, 1996). Plaintiff has advanced no valid reason for dismissing her original complaint; it is clear from the discussion at the June 8 conference that her attorney merely wished to conduct this litigation in state court. This desire, however, is not sufficient to impose additional and unnecessary costs upon her adversary.

Accordingly, the Court ORDERS Plaintiff to reimburse Defendant for any costs and attorneys' fees incurred in the original litigation on matters that will not be useful in this current matter; Plaintiff need not pay for research and review that remain of benefit to Defendant's case. See Katen v. Katen, No. 5:97-CV-275-BR(2), 1998 WL 721092, at *2 (E.D.N.C. Mar. 4, 1998); Esquival v. Arau, 913 F. Supp. 1382, 1388 (C.D. Cal. 1996); Behrle v. Olshansky, 139 F.R.D. 370, 376 (W.D. Ark. 1991).

Within fifteen days of entry of this order, Defendant must file an itemized accounting of the fees and costs it seeks. If Plaintiff contests any items for which Defendant seeks reimbursement, she must file detailed objections within fifteen days of Plaintiff's filing. Otherwise, Plaintiff must pay Defendant the amount requested within forty-five days or the Court will dismiss the matter without prejudice.

For the reasons stated, the Court GRANTS the motion of Defendant and STAYS all proceedings in this matter until Plaintiff pays Defendant for the costs and fees incurred in the original litigation of this matter.

ENTERED this 23 day of June, 1999.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SHIRLEY K. ROGERS.	)	
Plaintiff,	)	
v.	)	No. 97-3057 M1/A
WAL-MART STORES, INC.	)	
Defendant.	)	

ORDER DISMISSING CASE

Pursuant to the Stipulation of Dismissal Without Prejudice filed by the parties October 9, 1998, wherein the parties stipulate to the dismissal of this matter pursuant to Rule 41, this case is hereby DISMISSED without prejudice.

IT IS SO ORDERED THIS 14 DAY OF October 1998.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SHIRLEY K. ROGERS,

JUDGMENT IN A CIVIL CASE

VS.

CASE NO. 97-3057 M1/A

WAL-MART STORES, INC.

DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that, in accordance with the Order Dismissing Case, filed October 14, 1998, this case is DISMISSED WITHOUT PREJUDICE.

APPROVED:

/s/ Jon P. McCalla
JON PHIPPS MCCALLA
UNITED STATES
DISTRICT COURT

Oct. 14, 1998
Date

ROBERT R. DI TROLIO
Clerk of Court

[illegible]
(By) Deputy Clerk

Supreme Court, U.S.
FILED
FEB 23 2001
CLERK

(2)

No. 00-1196

In the Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,

v.

SHIRLEY K. ROGERS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS WHY WAL-MART'S PETITION SHOULD BE DENIED

The question presented by Wal-Mart's petition is as follows: "Does Rule 41(d) of the Federal Rules of Civil Procedure authorize awards of attorney fees?" Wal-Mart characterizes this as a question on which "at least four courts of appeals have taken a stand," adhering to three incompatible "schools of thought" and creating a "split" that is "recurring in nature and mature in its development." Petition, p. 9. In light of the admonition in Rule 15.2 of the Court's rules, plaintiff objects to Wal-Mart's characterization of the appellate court jurisprudence on this question.

Wal-Mart claims that the Eighth and Tenth Circuits have issued five decisions between them, joining the "school of thought that holds that district courts have discretion to award attorney fees as part of the costs that Rule 41(d) allows." Petition, p. 5. This is misleading. Only two of the decisions cited by Wal-Mart, Evans v. Safeway Stores, Inc., 623 F.2d 121 (8th Cir. 1980) and Meredith v. Stovall, 216 F.3d 1087 (10th Cir. 2000), even address the question presented. They do so in the most perfunctory, unanalyzed fashion possible. Evans, a *per curiam* opinion barely four paragraphs long, never analyzes the language of Rule 41(d) or the intent of its drafters. Meredith, an unpublished opinion, also contains no such analysis and relies without elaboration on a decision that addressed the propriety of fee awards under Rule 41(a)(2), not Rule 41(d).[1] While the lack

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[1] Of the three other circuit decisions cited by Wal-Mart as representative of the same school of thought, one does not relate to Rule 41 at all, Mercantile-Commerce Bank & Trust v. Southeast

of analysis in those two decisions perhaps should not be surprising given their peculiar circumstances – the Evans court did not have the benefit of briefs from both sides and the plaintiff/appellant in Meredith proceeded *pro se* – no one who reads those decisions can confuse their spare holdings with a mature, fully developed "school of thought."

Wal-Mart also claims that three Seventh Circuit decisions on Rule 41(d) represent another school of thought somehow in conflict with the Sixth Circuit's view of the question presented. This, too, is misleading. There is no difference between the Sixth Circuit's and the Seventh Circuit's answers to the central question whether Rule 41(d), as written, can be read to authorize an award of attorney fees. Both say it cannot. *Compare* Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868 (6th Cir. 2000) [App., p. 10a] ("We hold that attorney fees are not available under Rule 41(d). The reason is simple – the rule does not explicitly provide for them.") *with* Esposito v. Piatrowski, 223 F.3d 497, 500 (7th Cir. 2000) ("There is no language in the text of Rule 41(d) indicating that Congress intended to alter the 'American Rule' as the rule does not refer to attorneys' fees as an awardable cost.").

Ark. Levee Dist., 106 F.2d 966 (8th Cir. 1939); the other two pertain to the propriety of fee awards under Rule 41(a)(2), not Rule 41(d). Johnston v. Cartwright, 355 F.2d 32 (8th Cir. 1966); Nolen v. Henderson National Corp., 1993 WL 26817 (10th Cir.) (unpublished). Even the district court opinion on which Wal-Mart relies most heavily acknowledges that decisions addressing fee awards granted under Rule 41(a) "are not helpful in deciding" whether or not attorney fees may be awarded under Rule 41(d). Behrle v. Olshansky, 139 F.R.D. 370, 374 (W.D. Ark. 1991). To borrow Wal-Mart's analogy, one cannot discern the relational meaning of a term by looking at its *step*-siblings.

The fact that Seventh Circuit decisions approved attorney fee awards based on the added fact that the *federal* statutes on which the plaintiffs sued in those cases independently authorized such awards does not represent a difference of opinion between the Sixth and Seventh Circuits, much less one that is at all germane to this case. The Sixth Circuit never had an opportunity in this case to address that added feature of the Seventh Circuit cases. Granting certiorari would not afford the Court an opportunity to address that feature of the Seventh Circuit's decisions since this is a diversity action in which the common law of Tennessee supplies the rule of decision, no matter where the case might be tried, and no federal statutes are involved. There is no reason to think the Seventh Circuit would have decided this case any differently than the Sixth Circuit did. Depicting a circuit conflict befitting this Court's attention simply by juxtaposing decisions that addressed distinct situations is contrary to Rule 10(a), which requires that the appellate decision proposed for review be "in conflict with another United States court of appeals *on the same important matter* . . . ." (Emphasis added.)

The same fault that the Sixth Circuit found with district court opinions addressing the question presented – long on policy, but short on textual analysis – applies to Wal-Mart's petition as well. The fact that the nation's largest retailer and now the United States Chamber of Commerce are throwing their massive weight onto a small issue that the circuits have not even disagreed about meaningfully, and that these commercial behemoths are advancing *policy* arguments in urging review, ought to give the Court pause. This issue is a long way from being, as Wal-Mart says, "mature in its development" and "ripe for review." Petition, p. 9. Not a single circuit decision cited by Wal-Mart, for example, explores the implications of imposing dismissal/refiling-

triggered attorney fees in contexts such as: diversity cases; when the first dismissed case was a state action; when the state granted the plaintiff the right to dismiss the first action without a penalty akin to Rule 41(d); or when the second court has no record of what happened in the first action other than the dismissal, and, thus, no objective basis for judging the reasonableness of the defendant's attorney fees. Until the circuits have explored the question presented in all of its important settings, it is not worthy of this Court's attention.

CONCLUSION

Wal-Mart's petition should be denied.

Respectfully submitted,

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No. 00-1196

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IN THE
Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,

v.

SHIRLEY K. ROGERS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER WAL-MART STORES, INC.

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24 pp

QUESTION PRESENTED

When a plaintiff voluntarily dismisses an action and subsequently commences a new action containing the same claims against the same defendant, does Federal Rule of Civil Procedure 41(d) permit a district court to require the plaintiff to pay costs and attorneys' fees incurred in defending against the prior action?

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IN THE

Supreme Court of the United States

No. 00-1196

WAL-MART STORES, INC.,

Petitioner,

v.

SHIRLEY K. ROGERS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER WAL-MART STORES, INC.

The Chamber of Commerce of the United States (the Chamber), as *amicus curiae*, respectfully submits this brief in support of the petitioner Wal-Mart Stores, Inc.[1] By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.

[1] This brief was written entirely by counsel for the Chamber, and no person or entity other than the Chamber, its members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

STATEMENT OF INTEREST

The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the fifty states and the District of Columbia, the Chamber represents an underlying membership of nearly 3,000,000 businesses and organizations, with approximately 140,000 direct members of every size, in every sector of the economy, and every region of the country. The vast majority of the Chamber's members are small businesses.

An important function of the Chamber is to represent the interests of its members in important matters before the federal courts as well as before Congress and the Executive Branch, including federal agencies and commissions. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases before this Court that have raised issues of vital concern to the nation's business community. Recent representative cases in which the Chamber has filed *amicus curiae* briefs include: *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 297 (2000) (granting petition for writ of certiorari); *Circuit City Stores, Inc. v. Adams*, 120 S. Ct. 2004 (2000) (same); *United States v. Mead Corp.*, 120 S. Ct. 2193 (2000) (same); *Kolstad v. ADA*, 527 U.S. 526 (1999); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Auer v. Robbins*, 519 U.S. 452 (1997); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995).

Because American businesses and their customers shoulder the weight of high litigation costs in this country, the Chamber is keenly interested in the outcome of this litigation. Protracted litigation imposes significant costs on the Chamber's members, and the issue presented directly relates to the magnitude of these costs.

SUMMARY OF ARGUMENT

Wal-Mart's Petition for Writ of Certiorari presents a discrete question concerning the arsenal by which federal courts may discourage unduly protracted litigation. The amounts at issue are modest, but the significance of this case to the American business community is not. Unnecessary litigation costs impose a staggering burden on American businesses. When a plaintiff recommences an action, the ability to recover amounts expended to defend against an identical prior lawsuit voluntarily dismissed by the plaintiff serves to lessen this burden, and guards against the strategic abuse of the legal system.

The Court of Appeals for the Sixth Circuit noted correctly that the lower federal courts are divided regarding this issue. *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 874 (6th Cir. 2000). The court failed to recognize, however, that Rule 41(d) is a descendent of a court's inherent authority to levy sanctions before allowing a plaintiff to commence a previously-dismissed lawsuit. Like the power to dismiss a lawsuit for failure to prosecute, this power "is of ancient origin, having its roots in judgments of *nonsuit* and *non prosequitur* entered at common law." *Link v. Wabash R.R.*, 370 U.S. 626, 630 (1962).

In fact, Rule 41 was specifically designed to counter the prejudice to defendants caused by the liberal availability of nonsuits under the common law. Nevertheless, repetitive litigation continues to impose significant costs on American businesses. Indeed, the ability to obtain a voluntary dismissal after a defendant has incurred significant litigation expenses and recommence the action without threat of paying those expenses remains an effective means of extracting a favorable settlement from a defendant even in a frivolous lawsuit.

The clear division among lower courts on this issue warrants plenary review by the Court. This case presents an ideal opportunity, not likely to arise again soon, for the Court to

provide needed guidance. *Amicus* urges the Court to grant Petitioner Wal-Mart Stores, Inc.'s Petition for Writ of Certiorari.

ARGUMENT

I. THE COURT SHOULD AFFIRM THE POWER OF FEDERAL COURTS TO DISCOURAGE FRIVOLOUS LITIGATION

The question presented by Wal-Mart's Petition for Certiorari is about the power held by federal courts to dissuade unduly repetitive or vexatious litigation. Federal Rule of Civil Procedure 41(d) is an expression of this power, and includes the authority to require payment of costs and attorneys' fees as a condition for commencing a subsequent lawsuit.

The authority to require a plaintiff to pay costs incurred in a prior voluntarily dismissed action before allowing the plaintiff to commence a second action "was designed to prevent oppressive and vexatious litigation and also to enable a party who has recovered costs to obtain payment before being subjected to further litigation relating to the same subject-matter." *Weidenfeld v. Pacific Improvement Co.*, 101 F.2d 699, 700 (2d Cir. 1939) (Augustus Hand, J.); *accord Esposito v. Piatrowski*, 223 F.3d 497, 501 (7th Cir. 2000) ("the purpose of Rule 41(d) . . . is to deter forum shopping and vexatious litigation"); Moore's Fed. Prac. § 41.70[1] ("The purpose of the rule is to prevent forum shopping and vexatious litigation.").

Before the enactment of the Federal Rules of Civil Procedure, courts exercised their inherent authority under the common law to stay proceedings until a plaintiff paid the costs of a prior action involving substantially the same claim for relief as contained in the pending action. *See, e.g., Henderson v. Griffin*, 30 U.S. 151, 158 (1831); *Golden v. New York, N.H. & H.R. Co.*, 222 F. 348, 349 (S.D.N.Y. 1915)

(Learned Hand, J.); *Williams v. Getz*, 17 App. D.C. 388, 389-90 (1901); *Kimble v. Western Union Tel. Co.*, 70 F. 888, 889-90 (D. Del. 1895); *Buckles v. Chicago, M. & St. P. Ry.*, 47 F. 424, 426 (W.D. Mo. 1891); *Cocke v. Henson*, 5 F. Cas. 1148, 1149 (D. Ark 1832) (No. 2929a); *Ex Parte Mathews*, 40 So. 78, 79 (Ala. 1906); *Hobbs v. Louisville, H. & St. L. Ry.*, 102 S.W. 818, 819 (Ct. App. Ky. 1907); *Knee v. Baltimore City Passenger Ry.*, 40 A. 890, 892 (Md. 1898); *State ex. rel. Peery v. District Court*, 166 N.W. 1080, 1081 (Minn. 1918); *Hewitt v. Steele*, 38 S.W. 82, 82-83 (Mo. 1896); *Perkins v. Hinman*, 19 Johns. 237, 237 (N.Y. 1821); *Altman v. Altman*, 12 Pa. 246, 246 (1849); *Schwede v. Hemrich*, 69 P. 643, 644 (Wash. 1902); *Felt v. Amidon*, 3 N.W. 825, 828-29 (Wis. 1879); *cf.* IV St. George Tucker, Blackstone's Commentaries 296 (1803) (noting that after discontinuing a lawsuit, a plaintiff may "begin again, by suing out a new original, usually paying costs to his antagonist.").

In *Henderson v. Griffin*, the Court recognized this authority as necessary to protect defendants from abusive practices:

> Costs had accrued to the defendant by a suit brought and prosecuted by the plaintiffs in this suit, in the name of those who had no right to the land. It was perfectly consistent with the justice of the case, that when these plaintiffs sued the same defendant in their own name, for the same land, they should reimburse him for the past costs to which they had subjected him before they should be permitted to proceed further. Rules of this kind are granted by courts to meet the justice and exigences of cases as they occur, not depending solely on the interest which those who are subjected to such rules may have in the subject matter of suits which they bring and prosecute in the names of others; but on a variety of circumstances which in the exercise of a sound discretion may furnish a proper ground for their interference. . . . It is the exercise of a summary power

> to compel what under the circumstances of the particular case the court consider to be justice to a party in defending himself against an unfounded claim.

30 U.S. at 158-59.

While not directly implicated in this case, a court's inherent authority plainly includes the power to award attorney's fees. *Chambers v. NASCO, Inc.*, 501 U. S. 32, 45 (1991) ("[A]n assessment of attorney's fees is undoubtedly within a court's inherent power."); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-66 (1980) (discussing inherent authority to assess attorneys' fees against counsel); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 (1975) (acknowledging "assertions of inherent power in the courts to allow attorneys' fees in particular situations"); *Hall v. Cole*, 412 U.S. 1, 4 (1973) ("[F]ederal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require."); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939) ("Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts.").

As a general matter, courts may award attorney's fees under their inherent power only: (1) under the "common fund exception;" (2) when a party willfully disobeys a court order; and (3) when a party has acted in bad faith or vexatiously. *Chambers*, 501 U.S. at 45-46; *see also Roadway Express*, 447 U.S. at 766. It is important to recognize in this context, however, that the common law *presumed* that a second-filed lawsuit following a voluntary dismissal was vexatious. In fact, the authority to require the payment of costs from the prior action was "based upon the *presumption* that the second action is vexatious, or, if not vexatious, that the failure to succeed in the first action was attributable to the fault of the plaintiff." *Felt*, 3 N.W. at 828 (emphasis added); *accord Scales v. Central Iron & Coal Co.*, 55 So. 821, 825 (Ala. 1911) (Mayfield, J., concurring) (noting that second action was "deemed vexatious" under English common law); *Kitts v. Willson*, 89 Ind. 95, 99

(1883) ("the second action will be deemed vexatious until this inference shall be removed by a showing on the part of the plaintiff"); *Lake Agric. Co. v. Brown*, 114 N.E. 755, 756 (Ind. 1917) ("a second action between the same parties for the same cause will be presumed to be vexatious"); *Jones v. Barnard*, 63 Mo. App. 501, 505 (1895) ("the presumption is that the second action is vexatious"); *Bridge v. Sumner*, 18 Mass. 371, 371 (1823) ("The second action in such case is deemed to be vexatious."); *Cuyler v. Vanderwerk*, 1 Johns. Cas. 247, 247 (N.Y. Sup. Ct. 1800) ("The plaintiffs having voluntarily suffered a nonsuit in the first suit, the second is to be deemed vexatious."); *Odegard v. North Wis. Lumber Co.*, 110 N.W. 809, 814 (Wis. 1907) ("[W]here a plaintiff has been nonsuited and brings a second action for the same cause, a presumption arises either that the second action is vexatious or that the cause of action is without merit.").

Drawn from a court's inherent authority, the power under the common law to require the payment of costs before commencing a subsequent lawsuit was measured only by "what under the circumstances of the particular case the court consider to be justice to a party in defending himself against an unfounded claim." *Henderson*, 30 U.S. at 159; *accord Buckles*, 47 F. at 426 ("[T]his being in the nature of an equitable discretion, inherent in every court, it should be exercised cautiously, ex aequo et bono, employing or declining the power as the right and justice of the particular case may seem to require."). Indeed, this Court has long recognized that the statutory restrictions on fee shifting "contain[] nothing which can be fairly construed to deprive the Court of Chancery of its long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require . . . ." *Trustees v. Greenough*, 105 U.S. 527, 536 (1882).

It therefore is not surprising that courts enjoyed the authority to require a plaintiff to pay the litigation costs—

including attorneys' fees—incurred in defending against a previously dismissed action before commencing a new action asserting the same or similar claims. *See Reaume v. Wayne Circuit Judge*, 89 N.W. 953, 954 (Mich. 1902) (affirming trial court's grant of motion to set aside nonsuit upon payment of costs and attorney's fee).

Federal Rule of Civil Procedure 41(d) statutorily embodies the inherent power recognized under the common law in the specific context of repetitive filings. In fact, Rule 41 was enacted in response to liberal nonsuit provisions that permitted "the annoying of a defendant by being summoned into court in successive actions and then, if no settlement is arrived at, requiring him to permit the action to be dismissed and another one commenced at leisure." American Bar Ass'n, Proceedings of the Institute on Federal Rules 350 (1938) (remarks of Hon. George Donworth, member of Supreme Court Advisory Committee); *accord Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 410 (1990) (Stevens, J., concurring in part and dissenting in part) ("Prior to the adoption of Rule 41(a)(1), ... an unscrupulous plaintiff could harass a defendant by filing repetitive baseless lawsuits as long as each was dismissed prior to an adverse ruling on the merits."); *cf. In re Skinner & Eddy Corp.*, 265 U.S. 86, 93 (1924) (noting that "[i]t is ordinarily the undisputed right of a plaintiff to dismiss a bill in equity before final hearing"); *Barrett v. Virginian Ry. Co.*, 250 U.S. 473, 476 (1919) ("At the common law, as generally understood and applied, a nonsuit could be taken freely at any time before verdict if not indeed before judgment."); Neil C. Head, *The History and Development of Nonsuit*, 27 W. Va. L. Q. 20, 22 (Nov. 1920) ("It is clear that at common law the plaintiff had an absolute right to become nonsuit at any time before the jury rendered the verdict.").

At the same time, Rule 41 was designed to maintain only a "narrow slice" of the "expansive control" afforded plaintiffs

under the common law. *Cooter & Gell*, 496 U.S. at 397. The drafters even introduced the "two dismissal rule," an innovation unknown to the common law that eliminated the plaintiff's relatively unhindered right under the common law to repeatedly file and voluntarily dismiss an action. 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2368 (1995). Under Rule 41(a)(1), the second time that a plaintiff voluntarily dismisses an action, the dismissal constitutes an adjudication on the merits. Fed. R. Civ. P. 41(a)(1). The introduction of the "two dismissal rule" is evidence that Rule 41 was "designed to curb abuses of these nonsuit rules." *Cooter & Gell*, 496 U.S. at 397.

Enacted under these circumstances, Rule 41 was in no sense aimed at limiting a court's inherent authority to counter abuses of the right of voluntary dismissal. The language of Rule 41(d) actually mirrors the inherent power authorized under the common law in that it allows federal courts to require "the payment of costs of the action previously dismissed *as it may deem proper*." Fed. R. Civ. P. 41(d). In other words, a court's authority to require a plaintiff to pay costs incurred in defending against a prior voluntarily dismissed action remains defined by "what under the circumstances of the particular case the court consider to be justice to a party in defending himself against an unfounded claim." *Henderson*, 30 U.S. at 159.

In a similar context, this Court has held that Rule 41(b) was not meant to limit a court's inherent authority to dismiss an action *sua sponte* for lack of prosecution. *Link v. Wabash R.R.*, 370 U.S. 626 (1962). In *Link*, the petitioner argued that because Rule 41(b) did not expressly authorize a dismissal *sua sponte* for lack of prosecution, the Federal Rules permitted an involuntary dismissal only upon motion by the defendant. Rejecting this argument, the Court explained:

> Neither the permissive language of the Rule—which merely authorizes a motion by the defendant—nor its policy requires us to conclude that it was the purpose of

> the Rule to abrogate the power of courts, acting on their own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.... It would require a much clearer expression of purpose than Rule 41(b) provides for us to assume that it was intended to abrogate so well-acknowledged a proposition.

Id. at 630-32.

By attempting to read Rule 41 without reference to its common law antecedent, the Court of Appeals for the Sixth Circuit has made the same error as the petitioner in *Link*. The Chamber respectfully requests that the Court take this opportunity to address this error, and affirm the power of federal courts to discourage vexatious litigation.

II. THE SIXTH CIRCUIT'S OPINION PROMOTES THE FILING OF FRIVOLOUS LITIGATION

The issue raised by Wal-Mart's Petition for Writ of Certiorari is significant to American businesses because the answer implicates the scale of the burden imposed by frivolous litigation. Frivolous or not, tort litigation is expensive, inefficient, and poses a significant cost on American society, and American businesses in particular. Litigation costs oppress both tortfeasor and the non-negligent alike. As a result, defendants often face substantial costs regardless of the merits of a plaintiff's lawsuit.

This flaw in our system—that litigation costs are often divorced from the merits of a case—relates directly to our procedural rules. The Federal Rule at issue, Rule 41, preserves a plaintiff's ability to harass defendants through

strategic use of voluntary dismissal. This procedural device is used to heighten litigation costs and therefore encourage a defendant to settle a frivolous lawsuit. The prospect of paying a defendant's costs and attorneys' fees before recommencing a previously dismissed lawsuit, however, acts as a disincentive against this strategy. Because the potential infliction of significant litigation expenses on a defendant is critical to the persistence of frivolous lawsuits, the issue presented by Wal-Mart's Petition has considerable import.

The excesses of the tort system are familiar both to the Court, *cf. Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 297 (2000) (granting petition for writ of certiorari addressing standard of review of trial court's ruling on constitutionality of punitive damage award); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1995) (setting aside punitive damage award as contrary to due process), and to Congress, *e.g.*, 146 Cong. Rec. H466 (daily ed. Feb. 16, 2000) (statement of Rep. Biggert). In 1994, tort costs totaled over $150 billion, over three times the total in 1981, and far in excess of any other country. Tillinghast-Towers Perrin, Tort Cost Trends: An International Perspective, App. 2 (1995).

Legal fees undoubtedly constitute a major portion of this cost. *See, e.g.*, David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. Rev. 72, 91 (1983). Because a potential defendant faces substantial legal fees regardless of the outcome of litigation, our system deters not only risky behavior but also societally beneficial conduct. For example, the prospect of litigation has stifled the development of new contraceptives, vaccines, small planes and cars, medical procedures, and pesticides. Peter Huber, Liability: The Legal Revolution and Its Consequences 155-64 (1990); *see also* Don Dewees et al., Exploring the Domain of Accident Law 198-201 (1996) (collecting studies showing reduced innovation in various industries as result of litigation); James R. Thomas, Jr., *Liability Fears Gag Engineers*, Engineering News-Record,

May 4, 1998 (noting that threat of litigation has stifled use of new technology by engineers). "When all is said and done, the modern rules do not deter risk: they deter behavior that gets people sued, which is not at all the same thing." Huber, *supra*, at 164.

Frivolous lawsuits also remain an exasperating feature of our legal system. One recent lawsuit, for example, reportedly alleges that a pickle from a McDonald's hamburger burned the plaintiff's chin. Gail Rippey, *Wheels of Civil Justice Stuck in the Mud in Pa.*, Sunday News, Lancaster Pa., Jan. 28, 2001 at D5. No incident is too small for an enterprising plaintiff's lawyer to begin imposing costs on a defendant business.

Procedural rules that expand the stages of litigation encourage the filing of such frivolous lawsuits. Specifically, a plaintiff with a claim worth less than the cost of litigation may still be able to extract a settlement by increasing the litigation costs imposed on the defendant and bargaining at various stages of the litigation before trial. Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. Legal Stud. 1, 12 (1996). "The credibility of [a negative-expected-value] suit can arise from the fact that bargaining in 'late' rounds occurs after some of the plaintiff's litigation costs are sunk. There may arrive a stage at which a threat to continue all the way to judgment becomes credible by virtue of the small fraction of the litigation costs that remains to be incurred." *Id.* at 4. Anticipating this later round of bargaining, a defendant may settle the lawsuit at the outset—even though the plaintiff's litigation costs will exceed the expected value of a judgment—rather than proceed to the stage where the plaintiff will have a credible threat of going forward. *Id.* at 24 ("If the litigation process in these cases is sufficiently divisible, this divisibility might by itself provide plaintiffs with a credible threat, and it therefore might provide the defendant with an 'economic' reason to pay.").

Moreover, procedural rules can "provide incentives as powerful as those provided by substantive rules." Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 Ind. L.J. 59, 69 (Winter 1997). This is because procedural rules play a significant role in defining the costs of litigation. By doing so, procedural rules influence the dynamics of settlement. Frivolous lawsuits therefore remain viable so long as a defendant can be motivated to settle primarily by the threat of incurring additional legal fees.

This scholarship partly explains why "[d]ue to sloth, inattention, or desire to seize tactical advantage, lawyers have long indulged in dilatory practices. . . . [and] many actions are extended unnecessarily by lawyers who exploit or abuse judicial procedures . . . ." *Roadway Express, Inc.*, 447 U.S. at 757 n.4 (citing C. Dickens, Bleak House 2-5 (1948)). Plaintiffs with meritless claims capitalize on procedural devices that permit delay because such tactics increase the litigation costs imposed upon defendants, and thereby increase the settlement value of frivolous lawsuits.

Voluntary dismissal is one such device. Plaintiffs historically have exploited the ability to nonsuit an action as a strategic tool to extract a favorable settlement from a defendant. Federal Rule 41 was aimed at this very "mischief." American Bar Ass'n, *supra*, at 349-50 (remarks of Hon. Donworth). The potential for abuse remains available under the Federal Rules because recommencing a previously dismissed action after the defendant has incurred substantial legal fees greatly enhances the cost of the litigation. Indeed, "[t]he burden of being compelled to defend successive unconscionable suits . . . . increases in more than arithmetical proportion. . . . [S]uccessive suits may even wear a defendant down to the point of capitulation." *Soffos v. Eaton*, 152 F.2d 682, 683 (D.C. Cir. 1945).

Accordingly, the authority to require a plaintiff to pay attorneys' fees incurred in defending against a previously

dismissed action becomes important when the defendant is forced to expend significant resources in the previous lawsuit. Under appropriate circumstances, such as when a plaintiff employs a voluntary dismissal to escalate the defendant's exposure to legal fees in defending against a frivolous lawsuit, courts must be able to levy a meaningful sanction.

> Frivolous lawsuits cause appreciable harm to many persons, and in many ways. The person against whom the groundless suit is brought is subject to serious harassment and inconvenience, pecuniary loss through necessary attorney's fees, deprival of time from his business or profession, and, in some cases, harm to reputation and even physical damage to person or property. The court system itself becomes more clogged, disrupted, and delayed, thus affecting the taxpayers in general, and other litigants who have their suits delayed. The situation cries out for remedies to avert these harms.

John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 Hofstra L. Rev. 433, 433 (Spring 1996). In light of the significance of the question presented, the Chamber respectfully requests that this Court grant Wal-Mart Stores, Inc.'s Petition for Writ of Certiorari.

III. THIS CASE PRESENTS A RARE AND IDEAL OPPORTUNITY TO ADDRESS AN IMPORTANT PROCEDURAL ISSUE

Wal-Mart Stores, Inc.'s Petition raises an issue that has deeply divided the lower courts and, by its very nature, is not likely in an individual case to warrant the expenditure required to litigate before this Court. In other words, it takes a lot less to discourage a plaintiff from voluntarily dismissing and subsequently recommencing a lawsuit than it usually does to warrant an appeal and argument before this Court. Wal-Mart Stores, Inc.'s petition provides an opportunity for the Court to overcome this economic fact.

Moreover, this case provides a clean vehicle by which this Court can resolve a very well-defined yet unsettled question. As noted by Petitioner Wal-Mart Stores, Inc., whether Rule 41(d) includes attorneys' fees is a question upon which the lower courts do not agree. *Compare Sanderson v. Spectrum Labs, Inc.*, No. 00-1872, 2000 U.S. App. LEXIS 34058, at *17-19 (7th Cir. Dec. 29, 2000); *Duffy v. Ford Motor Co.*, 218 F.3d 623, 632-33 (6th Cir. 2000); *Meredith v. Stoval*, No. 99-3350, 2000 U.S. LEXIS 14553, at *4-5 (10th Cir. June 23, 2000), *Esposito*, 223 F.3d at 500; *Simeone v. First Bank Nat'l Ass'n*, 971 F.2d 103, 108 (8th Cir. 1992), *Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th Cir. 1980), *Esquivel v. Arau*, 913 F. Supp. 1382 (C.D. Ca. 1996), *Anders v. FPA Corp.*, 164 F.R.D. 383 (D.N.J. 1995); *Behrle v. Olshansky*, 139 F.R.D. 370 (W.D. Ark. 1991), and *Eager v. Kain*, 158 F. Supp. 222, 223 (E.D. Tenn. 1957), *with Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868 (6th Cir. 2000), *Simeone v. First Bank Nat'l Ass'n*, 125 F.R.D. 150, 155 (D. Minn. 1989), *aff'd in part and vacated in part*, 971 F.2d 103 (8th Cir. 1992), *Pocono Racing Mgmt. Ass'n v. Banks*, 434 F. Supp. 507, 513 (M.D. Pa. 1977), and *Yetter Homes, Inc. v. Coastal Cabinet Works, Inc.*, 234 F. Supp. 568, 572 (E.D.S.C. 1964). What is more important, however, is that waiting until even more lower courts grapple with this issue is not likely to significantly alter the terms of the debate. Rule 41(d) contains the same language, and is designed to perform the same function, as when it became law in 1938.

CONCLUSION

For the foregoing reasons, and for those stated in the petition, the Court should grant the petition.

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IN THE
Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

SHIRLEY K. ROGERS,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its petition, Wal-Mart Stores, Inc. demonstrated that this case presents an unanswered federal question that is recurring in nature, that has eluded uniform interpretation since 1938 and that the Sixth Circuit incorrectly answered. It showed that this construction of Rule 41(d) of the Federal Rules of Civil Procedure implicates "a split of authority" in the lower courts -- as the Sixth Circuit itself recognized. Pet. App. 10a. It showed that the decision below not only differs from what "the majority of courts" have done, as the Sixth Circuit again recognized, *id.*, but also is mistaken because it innovated a clear-statement requirement for awarding attorney fees when there is none. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994) (recognizing that attorney fees may be permitted in the absence of a clear statement "if the statute otherwise evinces an intent to provide for such fees"). And it showed that the issue is important to the functioning of the lower courts and arises with considerable frequency at the trial level. Since the submission of the petition, the Chamber of Commerce of the United States has filed a brief *amicus curiae* that supports each of these points and more. Among other things, it demonstrates that "Rule 41 was specifically designed to counter the prejudice to defendants" caused by the availability of nonsuits, and that the "repetitive litigation" that the Rule tries to thwart "continues to impose significant costs on American businesses." U.S. Chamber Br. 3.

Respondent understandably takes a different tack, though not as different as one might expect. She ultimately takes issue with just one component of the petition, and offers no response to the other grounds for granting the writ.

1. At no point does respondent raise, or even hint at, a procedural obstacle to reviewing the question presented. No jurisdictional impediments exist, an appealable order is in place, and there is no independent and adequate state ground precluding review. Nor does respondent argue that the case contains any other factual or procedural impediments that

would create vehicle problems for addressing the question presented.

2. Respondent also offers no defense to the Sixth Circuit's decision on the merits. Even though the court of appeals acknowledged "that the majority of courts find that attorney fees *are available* under Rule 41(d)," Pet. App. 10a (emphasis added), respondent does not attempt to justify the lower court's decision on the merits or attempt to defend its innovation of a clear-statement requirement for determining whether the Federal Rules authorize attorney fees. *See* Pet. App. 13a ("In short, we are persuaded by the fact that Congress did not explicitly provide for attorney fees in Rule 41(d)."). Making this failure to defend the lower-court decision all the more conspicuous is the Chamber of Commerce's historical analysis regarding the meaning of Rule 41(d), U.S. Chamber 4-10, which confirms the implausibility of the appellate court's interpretation.

3. Neither does respondent counter the argument (Pet. 14-16) that this question is recurring in nature and that its resolution will provide an important litigation-management tool for the lower courts. The sheer number of lower-court decisions wrestling with the question demonstrates the necessity of resolving this issue sooner rather than later.

4. Respondent's sole disagreement with the petition instead relates to the existence of a lower-court split. This to be sure is a relevant issue, but respondent does not advance her cause in contesting it. For one, her view that the decision does not implicate a division of authority diverges from the view of the lower-court decision that she purports to be defending. In the Sixth Circuit's words: "There is a split of authority as to whether Rule 41(d) authorizes attorney fees as part of any award of 'costs.'" Pet. App. 10a. As the petition demonstrates (Pet. 4-9) and as the Chamber of Commerce has confirmed (U.S. Chamber 15), there assuredly is a mature division of lower-court authority.

For another, her challenge to the number of schools of thought implicated by the split hardly disproves the merits of the petition. In quibbling over whether *Esposito v. Piatrowski*, 223 F.3d 497 (7th Cir. 2000), represents a third school of thought on this issue or merely adheres to the view embraced by the Sixth Circuit, respondent does not offer a tenable explanation for denying the writ. Under the Court's Rules and practices, it suffices to identify a division between the lower courts over *two* competing interpretations of a statute. It has never been the rule that petitioner must establish disagreement among the lower courts over *three* competing interpretations. In contending (Resp. 2) that "there is no difference between the Sixth Circuit's and the Seventh Circuit's answers to the central question" presented, respondent thus makes an argument regarding only the number of competing schools of thought. It is not an argument that undermines the certworthiness of the petition.

For a final reason, respondent errs in suggesting that the courts of appeal have not issued decisions that conflict with the Sixth and Seventh Circuits. The fact is, the decision in this case would have come out differently in the Eighth and Tenth Circuits, and that is all that matters. In the Eighth Circuit, a trial court may award "attorney fees" under "Fed.R.Civ.P. 41(d)," and the only question on review is whether the trial court "abuse[d] its discretion" in doing so. *Evans v. Safeway Stores, Inc.*, 623 F.2d 121 (8th Cir. 1980). That *Evans* contains only a brief analysis goes not to the binding nature of the opinion but to the ease with which that determination was reached. After all, Rule 41(d) by its terms permits any award of costs that the trial court "may deem proper." In the Eighth Circuit's view, the discretionary words of the Rule made this interpretation self-evident. The decision, at all events, is binding on future Eighth Circuit panels, *see Ramsey v. Bowersox*, 149 F.3d 749, 760 (8th Cir. 1998) ("One panel of this court is bound by the decisions of other panels."), which presumably is why lower courts within the Eighth Circuit since

1980 have continued to exercise this discretion in awarding attorney fees. *See Behrle v. Olshansky*, 139 F.R.D. 370 (W.D. Ark. 1991) (awarding fees under Rule 41(d)). Likewise, in the Tenth Circuit, "the decision whether to impose costs and attorney's fees is within the discretion of the trial court" under "the language of Rule 41(d)." *Meredith v. Stovall*, 216 F.3d 1087, 2000 WL 807355, at *1 (10th Cir. June 23, 2000). This position is consistent with other Tenth Circuit decisions that have recognized the analogous authority to impose attorney fees under Rule 41(a), *see, e.g., AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1528 (10th Cir. 1997), *Nolen v. Henderson Nat'l Corp.*, 986 F.2d 1428, 1993 WL 26817, at *4 (10th Cir. Feb. 5, 1993), and has been adhered to by lower courts within the circuit, *see, e.g., Wahl v. City of Wichita*, 701 F. Supp. 1530, 1533 (D. Kan. 1988); *In re Wy. Tight Sands Antitrust Cases*, 121 F.R.D. 685, 688 (D. Kan. 1987).

In contrast to these two circuits, the courts of appeal of the Sixth and Seventh Circuits believe that trial courts have no such authority. In their view, the language of Rule 41(d) precludes trial courts from generally exercising such discretion in cases like this one. Add to this the fact that the views of the Sixth and Seventh Circuits diverge from the pre-1938 common-law practice of permitting attorney-fee awards in this setting, *see Henderson v. Griffin*, 30 U.S. 151, 158 (1831), U.S. Chamber Br. 4-10 (collecting cases), and it becomes clear that the issue has been sufficiently developed to warrant review. In the final analysis, the conflict is real; the division is mature; and the issue is cleanly presented. Review is appropriate.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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